

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of

Acceleration of Broadband Deployment:)	
Expanding the Reach and Reducing the Cost of)	
Broadband Deployment by Improving Policies)	WC Docket No. 11-59
Regarding Public Rights of Way and Wireless)	
Facilities Siting)	

COMMENTS OF CARROLLTOWN BOROUGH, PENNSYLVANIA

I. INTRODUCTION

The Borough of Carrolltown located in Washington County, Pennsylvania, files these comments in response to the Notice of Inquiry ("Notice") in the above captioned proceeding. As requested in the Notice, these comments include a summary of the Borough's policies related to broadband access to the public rights-of-way ("ROW's). They also include a description of the Borough's authority under Pennsylvania law for adopting and implementing ROW policies and procedures, should it decide to in the future. Finally, the comments respond to the Commission's questions regarding possible actions it should take or not take with respect to ROW management practices. These comments do not address wireless facilities siting issues, except as they relate to wireless facilities in the ROW's.

The Borough strongly supports the Commission's policy objective of expanding broadband deployment throughout the nation. We also share the Commission's view that ROW access by broadband providers must be on fair and reasonable terms through a predictable and timely process. The record below demonstrates that the Borough is not an obstacle to broadband access to the ROW's. The Borough strongly opposes, therefore, any effort on the part of the Commission to adopt guidelines or promulgate rules that address municipal ROW practices or fees. Any such attempt would amount to a solution in search of a problem.

While Carrolltown Borough currently does not have ROW management practices in place, it acknowledges its commitment and responsibility to public safety, the physical maintenance of its streets and roads, protection of the Borough's own facilities in the ROW's, and control of traffic disruption. It is a small Borough and there has been little interest on behalf of private occupants to access the Borough's ROW's. The Borough still recognizes how essential it is to balance the interests of the municipalities with the interests of private occupants of the ROW's. This balancing of interests reflects the individual and unique conditions of our roads and our local community. A "one size fits all" regulatory regime imposed on a national scale would undermine these local interests, would be harmful to broadband deployment, and simply would not work as applied to thousands of diverse communities throughout the nation.

II. MUNICIPAL RIGHT-OF-WAY POLICIES

Carrolltown Borough currently has no right-of-way management practices in place. It does not have a ROW and/or street cutting ordinance, and it does not have a road occupancy permit application process in place. Additionally, it does not charge any fees to companies doing work in the Borough's ROW's. As the Borough Council President stated, "The Borough has an open door policy for any company that wants to put equipment in the ROW's." While no broadband providers have entered the Borough over the recent past, should a company wish to install wires and/or fiber in the Borough's ROW's, they could do so without charge and with great ease.

Carrolltown Borough provides a perfect illustration of how broadband deployment is not impeded by local municipal regulatory authority. Despite the fact that there are no requirements imposed or costs charged to companies entering the Borough's ROW's, not a single broadband provider has requested access to the Borough. The only Internet service currently available to Borough residents is Comcast cable modem service and, in some parts of the Borough, Verizon DSL service. Verizon does not offer FIOS, and other than Comcast and Verizon, there are no other Internet Service Provider's ("ISP's") providing service. The Borough would welcome improved and faster Internet options for its residents and wishes there was meaningful competition. In sum, broadband providers' decisions not to deploy broadband in Carrolltown Borough is not due to obstacles imposed as a result of the Borough's approach to ROW management.

III. MUNICIPAL RIGHT-OF-WAY AUTHORITY IN PENNSYLVANIA

Under Pennsylvania law, Carrolltown Borough is governed by the Pennsylvania Borough Code (53 P.S. § 45101 *et. seq.*). Boroughs, which are generally smaller than cities, have been incorporated as such and have a population of at least 500 residents. They utilize a Mayor-Council form of government. Pennsylvania statutes, in general, and the Borough Code more specifically, provide Carrolltown Borough with substantial and broad regulatory authority over its rights-of-ways. They also require that Carrolltown approaches its right-of-way management in a competitively neutral and non-discriminatory manner.

Despite the fact that Carrolltown does not have ROW management practices in place, it has the legal authority to do so. Section 46202 of the Borough Code vests enumerated powers in a Pennsylvania Borough and authorizes it to enact ordinances to exercise those powers. Incorporated within this exercise of power is the authority to provide for their enforcement and to prescribe penalties for the violation thereof. There are two specific powers in this Section whereby Boroughs derive much of their authority over the ROW's. First, Boroughs have broad police powers that allow it "...To make such regulations as may be necessary for the health, safety, morals, general welfare and cleanliness and the beauty, convenience, comfort and safety of the borough." 53 P.S. § 46202(6).

ROW management falls within these broad police powers. More specifically, within the corporate powers granted to Boroughs, ROW authority is clearly delineated. This ROW authority includes the general authority to regulate streets. Boroughs have the power:

To regulate the streets, sewers, public squares, common grounds, sidewalks, curbs, gutters, culverts and drains, and the heights, grades, widths, slopes and construction thereof; and to prohibit the erection of construction of any building or other obstruction to the convenient use of the same. (53 P.S. § 46202(17)).

In addition to the powers that Pennsylvania Boroughs derive from the Borough Code, they also have specific statutory powers with respect to public utilities which are applicable to all municipalities in Pennsylvania. Section 1991 of the Municipal Code, entitled "Use of Streets by Public Utilities" provides in pertinent part:

The proper corporate authorities of such municipality shall have the right to issue permits determining the manner in which public service corporations...shall place, on or under or over such municipal streets or alleys...pipes, conduits, telegraph lines, or other devices used in furtherance of business; and nothing herein contained should be construed to in any way affect or impair the rights, powers, and privileges of the municipality in, on, under, over or through public streets or alleys of such municipalities, except as herein provided.

53 P.S. § 1991. The operative part of this section is that municipalities have the legal right to issue permits to public utilities.

A similar right for all Pennsylvania municipalities with respect to public utilities is found in the Pennsylvania Business Corporation Law. Section 1511, entitled "Additional Powers of Certain Public Utility Corporations," primarily provides public utilities with the right to condemn property for utility-related purposes. Subsection (e) of the section, however, outlines the rights of utilities to use the streets and the parallel rights of municipalities to regulate that use. It states, in pertinent part, that "[b]efore entering upon any street, highway or other public way, the public utility corporation shall obtain such permits as may be required by law and shall comply with the lawful and reasonable regulations of the governmental authority having responsibility for the maintenance thereof." 15 Pa. C. S. § 1511(e)

In sum, Pennsylvania Boroughs have well established legal authority over the streets and roads within its jurisdictional boundaries. This includes its general police powers to adopt ordinances for its management and for the safety and welfare of its residents, as well as the authority to regulate all activity within its ROW's. This authority applies to all occupants of the ROW, including broadband providers.

IV. THE COMMISSION SHOULD NOT REGULATE LOCAL RIGHT-OF-WAY MANAGEMENT

A. Introduction

The Borough of Carrolltown supports the Commission's policy objective of expanding broadband deployment throughout the nation and throughout our Borough. We agree that

broadband technology and services promote economic development and vastly improve education, healthcare and other critical services. In addition, broadband competition has the potential to lower rates and improve customer service for our residents. For that reason, we encourage and welcome broadband deployment and competition in our community.

The Borough also shares the Commission's view, as expressed in Paragraph 4 of the Notice, that access by broadband providers to the ROW's must be on fair and reasonable terms through a predictable and timely process. While the Borough currently does not have ROW management procedures in place, it feels strongly that any practices that may be adopted in the future should impose minimal efforts and costs on broadband providers, should be fully transparent, and should result in prompt disposition of applications. The Borough acknowledges that it is best suited to managing broadband providers along with other occupants of its ROW's, since it is best able to reflect the particular, local conditions of its community.

The Borough strongly opposes, therefore, any effort on the part of the Commission to adopt policy guidelines or rules that address municipal ROW practices or fees. Clearly, it is not the Borough's ROW policies or practices that discourage broadband deployment in Carrolltown, since there are none in place. On the contrary, the Borough's welcomes broadband providers to deploy within its boundaries and insures direct, easy access to its ROW's.

The purpose of the Notice is to explore "specific steps that could be taken to identify and reduce unnecessary obstacles to obtaining access to rights-of-way..." (NOI ¶10). Based on the absence of ROW management procedures or assessment of fees in the Borough, it is evident that the Borough poses no obstacle to broadband deployment. We urge the Commission, therefore, not to attempt to regulate, through new rules, guidelines or other mandatory mechanisms, local management of the ROW's. As demonstrated by Carrolltown Borough, if companies are slow to deploy broadband, it's not because of imposing municipal practices, but rather due to other, internal or financial concerns.

B. ROW Procedures and Fees

The Notice asks for a detailed description of the Borough's broadband policies and procedures with respect to the ROW's. Section II above demonstrates that, to date, the Borough has not implemented any such procedures. As such, any broadband provider could enter the Borough's ROW's without a permit, and without paying any fees. The Borough imposes no obstacles to the deployment of broadband within its boundaries.

C. Policy Goals and the Need for Local Control

Although the Borough does not have any ROW management procedures in place, as described in Section III above it has regulatory authority over its streets and roads. The Borough Code acknowledges the critical issues that Boroughs face in maintaining their streets and roads, and has provided Boroughs with the requisite authority to address these policy concerns. The first and foremost goal that Boroughs have in managing their streets and road is public safety. It is critical that the wires, pipes, poles, pedestals and other equipment in the ROW's are installed and maintained in a safe manner. By way of example, there have been at least two recent incidents in Pennsylvania in which communications company contractors pierced gas lines in the ROW that resulted in personal injury and destruction of property. This occurred in Hempfield

Township in Westmoreland County on March 22, 2000 and in Moon Township in Allegheny County on March 16, 2005.

Second, Boroughs have a strong interest in maintaining their streets and roads in good condition. The public ROW's are one of the most important assets of any municipality and must be properly maintained. The streets and roads of different municipalities are completely different from each other, depending on such factors as terrain, the time period in which they were constructed, whether they have sidewalks, the density of the residential or commercial corridor, etc. For municipalities in the Northeast/Midwest, ROW maintenance can be especially challenging during harsh winters.

Third, Boroughs have an obligation to protect and maintain their own facilities in the ROW's. These include, but are not limited to, traffic signals, water and sewer facilities, storm drainage basins, etc. These facilities must reside in close proximity with the equipment and facilities of the other occupants of the ROW's. Finally, it is important that vehicular traffic disruption be safely controlled during installation or maintenance of communications facilities.

In short, Boroughs must balance multiple ROW public policy goals that reflect their particular conditions. These goals apply not only to broadband providers, but also to telephone, gas, electric, water and other providers. These goals are inherently local and reflect the individual and unique conditions of our roads and our local community. They are inconsistent with the Commission's national perspective. While Carrolltown Borough embraces the goal of broadband expansion, it recognizes that it must do so with respect to its own local interests. A "one size fits all" regulatory regime imposed on a national scale simply will not work. It will undermine these local interests and harm broadband deployment, causing extensive delays as municipalities attempt to integrate a national template into its local practices.

D. The Commission Should Not Interfere With Local ROW Management and Should Take Action to Preempt Pennsylvania's Municipal Broadband Prohibition

Carrolltown Borough does not present any obstacle to broadband deployment. As such, the Borough strongly opposes any effort by the Commission to engage in rulemaking or adjudication with respect to municipal ROW management or fees.

In response to the specific questions posed in the Notice regarding "Solutions" (Notice, ¶¶34-50), the Borough could potentially support and participate in Commission sponsored educational efforts and voluntary activities (¶37) as well as the compilation of best/worst practices (¶ 38). Any efforts to adopt policy guidelines (¶46), promulgate rules (¶47), make recommendations to Congress (¶44) or establish Commission sponsored mediation (¶42), however, would be an unnecessary and harmful interference with local ROW management.

Having said this, a law in Pennsylvania that is a genuine obstacle to broadband deployment is the prohibition against municipal broadband deployment embodied in Chapter 30 of the Pennsylvania Public Utilities Code. Specifically, Section 3014(h) states that political subdivisions (generally municipalities or counties) are prohibited from offering broadband services to the public for compensation. 66 Pa. C.S. §3014(h). The only exception is if the municipality or county submits a written request to the incumbent local exchange carrier (ILEC),

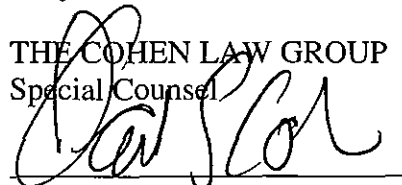
and if the ILEC decides not to deploy the requested broadband service (at the requested data speeds) in that jurisdiction.¹

This conditional prohibition on community broadband has had a major "chilling effect" on broadband deployment in Pennsylvania. A large portion of Pennsylvania is comprised of rural communities, and many providers appear to have decided, presumably after performing a cost-benefit analysis, not to deploy broadband in many of these communities. As a result, these communities often have slow and substandard internet service that stymies economic development and impedes advances in education, healthcare and other services.

The Commission is well aware of the rapid growth of community broadband networks throughout much of the nation. With rare exceptions, however, the deployment of such networks is effectively barred in Pennsylvania. We strongly urge the Commission to take the appropriate steps, through either regulation or recommendation of legislation, to preempt the prohibition of municipal broadband networks in Pennsylvania and similarly situated states.

Respectfully submitted,

By: THE COHEN LAW GROUP
Special Counsel



Daniel S. Cohen, Esq.
Phillip M. Fraga, Esq.
Stacy L. Browdie, Esq.
1000 Gamma Drive - Suite 305
Pittsburgh, PA 15238
(412) 447-0130

cc: National League of Cities
National Association of Telecommunications Officers and Advisors
Pennsylvania League of Cities and Municipalities
Pennsylvania State Association of Boroughs
Pennsylvania State Association of Township Commissioners
Pennsylvania State Association of Township Supervisors
The United States Conference of Mayors

¹ If the ILEC agrees to provide the requested broadband service, then it must do so within 14 months of the receipt of the request from the municipality or county. Id.